IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 359 OF **2003**

Prafulkumar Bharmardas Das ... Appellant

v/s.

The State of Maharashtra ... Respondent

Ms. Sharmila Kaushik for the appellant.

Mr. V.B.K. Deshmukh, A.P.P. for the Respondent.

CORAM: **V.G. PALSHIKAR &**
SMT. NISHITA MHATRE, JJ.

DATED: **15TH DECEMBER, 2006**

ORAL JUDGEMENT (PER SMT. NISHITA MHATRE, J.):

1. The appellant before us is convicted under Section 302 read with 34 of the Indian Penal Code. He has been sentenced to undergo imprisonment for life and to pay a fine of Rs.500/-. The appellant has preferred the present appeal challenging the conviction and sentence by the Additional Sessions Judge, Greater Bombay.

2. According to the prosecution, one Raj Punjabi was earning his livelihood in Mumbai as a painter. The accused was employed in Mumbai on a casual basis and worked as a plumber. On the relevant day i.e. on 23.4.1998, one Chandrakant Mishra, a Civil Engineer

engaged one Pravinkumar as a contractor to complete the paint job on a building known as Beuna Vista. Raj Punjabi was one of the workers engaged by Pravinkumar for painting the building. It is the case of the prosecution that Raj Punjabi, not only worked as a painter, but erected the scaffolding on the building. The case of the prosecution is that, on 23.4.1998, Raj Punjabi, the accused, one Batka and another person known as Hydrabadi were engaged to erect the scaffolding on Beuna Vista building in Bandra. A quarrel erupted between Raj Punjabi on the one hand and the accused and Batka on the other regarding payment of wages. The accused and Batka were insisting that they should get higher wages which was agreed to by the contractor when they were engaged for the day. Raj Punjabi, on the other hand, was trying to pacify them saying that the extra amount would be paid only after the contractor, Chandrakant came to the site. Raj Punjabi on the one hand and the accused and Batka on the other hand were engaged in a fist fight. This discontent, according to the prosecution continued because each of the workers was not paid the wages that he had been promised. According to the prosecution, the accused and Batka left the site while Raj Punjabi and Pravinkumar and a worker known as Hydrabadi, engaged a rickshaw to proceed to the Bandra Station.

At the junction of Water Field Road and 30th Road, another rickshaw overtook their rickshaw and halted in front of it. Raj Punjabi was pulled out by the accused and Batka. They assaulted him with fist blows. Batka then inflicted a knife blow on Raj Punjabi's chest. The accused caught hold of the victim at his waist and Batka inflicted another blow with the knife. The victim collapsed and the accused and Batka left the scene of offence. Pravinkumar informed the police. The victim was taken to hospital where he was declared dead. The accused was arrested on 15.9.1998, five months after the incident. He denied having committed the offence. He was charged under Section 302 read with 34 of the Indian Penal Code for having murdered Raj Punjabi. Significantly, the other accused, Batka is absconding and has not been tried. The accused was tried by the Sessions Court, Mumbai and was convicted and sentenced under Section 302 read with Section 34 of the Indian Penal Code.

3. The prosecution has relied upon 12 witnesses to prove its case against the accused. PW-1 is the police constable who served the summons on the complainant Pravinkumar. PW-2 is Pravinkumar, the complainant. PW-3 is a tea-stall owner who runs his business near the Beuna Vista building, on which the accused and the

victim were working. PW-4 is the panch witness. He has proved the inquest panchanama and the spot panchanama. PW-5 is the medical officer who conducted the post-mortem examination on the dead body of the victim. PW-6 is the plan maker who has drawn the plan of the scene of offence. PW-7 is a person who runs a tea stall at the junction where the incident occurred. PW-8 is the Sub-Inspector who was involved with the investigation. PW-9 is the police officer who arrested the accused on 15.9.1998 from Vile Parle railway station. PW-10 is another police officer involved with the investigation who took charge of the accused from the Juhu Police Station. PW-11 and 12 are the police officers who were attached to Khar Police Station at the relevant time.

4. With the assistance of the learned advocate appointed for the accused and the learned A.P.P., we have scrutinised the evidence on record and we are unable to accept the findings recorded by the Sessions Judge. The learned Sessions Judge has convicted the accused under Section 302 read with 34 of the Indian Penal Code, although no other person was arraigned with him. In our opinion, the conviction is unsustainable.

5. The learned advocate for the accused has submitted

before us that the identity of the accused has not been established. The witnesses who were examined by the prosecution have all named a person known as Kalu. However, there is no evidence on record, points out the learned advocate, to establish that Kalu and the accused are one and the same person. She has then submitted that assuming that Kalu and accused are identical, the accused has not inflicted any serious wounds on the victim. The accused had merely inflicted fist blows to which the victim retaliated in good measure. Therefore, according to the learned advocate for the accused, the accused could not have been found guilty of the offence under Section 302 of the Indian Penal Code. Moreover and as rightly urged by her, he was the only person arraigned as an accused in this case. The question of there being any common intention and conviction based on Section 302 read with 34 of the Indian Penal Code is unsustainable.

6. We will first consider whether the identity of the accused has been established by the prosecution. PW-2 who is the complainant, has spoken about a person named Kalu being engaged to erect the scaffolding on the building known as Beuna Vista. He was engaged alongwith the victim Raj Punjabi, a short person called Batka and a person from Hydrabad who was called

Hydrabadi. PW-2 saw Kalu for the first time on the fateful day i.e. on 23.4.1998. PW-2 has described the incident which occurred on the site where they were all working. Again in this description, the witness has mentioned the presence of Kalu. Throughout his evidence he refers to Kalu and does not name the accused. The F.I.R. which was lodged by the PW-2 and the description given by him shows that he had named Kalu, aged approximately 28 years. The address of Kalu was not known to the complainant. Kalu has been arrested about five months after the incident. He was arrested on 15.9.1998 by PW-9 from the Vile Parle Railway Station. According to PW-9, he received a telephone call at 8.00 am when he had just completed his duty at Juhu police station, that a person who fitted the description of Kalu, was at Vile Parle railway station. The investigating officer who has been examined in this case as PW-12 has admitted that although the accused was arrested, his associate was not traced. This witness has stated that till the accused was arrested, nobody knew that his name was Prafulkumar Bharmardas Das, since the complainant knew him only as Kalu. PW-12 has stated that, after the offence was committed, a video recording of the persons who gathered outside the Khar railway station for obtaining work as casual labour, was shown to PW-2. He

identified the accused as the person who had committed the crime and, therefore, the photograph of the accused was sent to various police stations. It is on this basis that the accused has been arrested. The very fact that PW-2 had seen the accused fleetingly only on the day of the offence would indicate that PW-2 could not have had a clue about the identity of the accused. Presuming that PW-12 has spoken the truth about the video recording of all the persons who had gathered for daily work as labourers being made, on the basis on which PW-2 had identified the accused, it was necessary for the prosecution to produce that film on record before the trial Court. Admittedly, hundreds of workers gather outside Khar railway station each day It is a nebulous population of daily labourers, which could change from day to day. As noted earlier, PW-2 had seen Kalu only on the day of the incident and, therefore, it is difficult to believe that he could identify the accused from this sea of workers who gathered outside the Khar railway station on the day the film was recorded.

7. PW-3 is a tea stall owner who was manning a tea stall near Beuna Vista building. He witnessed the quarrel between Kalu and Raj Punjabi, the victim herein, when both of them were having tea at his stall.

He has spoken about a bleeding injury on Kalu's lip and about the threat meted out to the victim by Kalu as a consequence. This witness also states that he saw Kalu for the first time on 23.4.1998. He has stated that, when he had gone to identify the accused at the police station, the police told him that his name was not Kalu but was Ajay Yadav. Obviously, this witness was unable to identify Kalu. If we accept that the person who PW-3 identified as Kalu was Ajay Yadav, there is no explanation as to why the appellant was prosecuted.

8. Another tea stall owner was examined by the prosecution is PW-7. He was manning a tea stall at the junction of Water Field Road and 30th Road, where the incident occurred. However, this witness has been declared hostile and, therefore, his testimony is of no avail to the prosecution. Therefore, in our opinion, the prosecution has failed in establishing that the person named Kalu, who PW-2 and PW-3 speak of, is the accused in the present case.

9. Assuming that Kalu and the accused are one and the same person, it would be necessary to consider what is the role attributed to him by the prosecution. PW-2 speaks of the grievance that Kalu had against the victim since the wages that he had settled to work for

were not paid to him. According to the PW-2, the accused was engaged for erecting the scaffolding with several other workmen. All the workmen had a grievance that they were not paid the wages which were agreed by the contractor and the sub-contractor, the victim herein. PW-2 witnessed the quarrel between Kalu and Batka on the one hand and the victim on the other. He has spoken about their trading fisticuffs. He has also mentioned that Kalu's shirt was torn in this scuffle. PW-2 then has described the incident which occurred at the junction of Water Field Road and 30th Road, Bandra. He has stated that a rickshaw in which he was proceeding alongwith the victim and Hydrabadi, was overtaken by another rickshaw as a result of which the vehicle in which he was travelling came to a halt. Kalu and Batka alighted from the rickshaw. The witness then states that Kalu caught hold of the victim's shirt and pulled him out of the rickshaw, although he was sitting between PW-2 and Hydrabadi. This witness then states that the victim was assaulted by Kalu and Batka. The victim was strong and stout. According to the witness, he was meeting the blows of the other two and retaliating. It was then stated that Batka whisked out a knife which was at his waist and inflicted a knife blow on the victim. At the same time, Kalu caught hold of the victim around his waist while Batka inflicted

one more blow with the knife on the victim's chest. Kalu and Batka then boarded the same rickshaw and sped away. Therefore, the only role attributed by this witness to Kalu is that he dealt some fist blows to the victim which were met by the victim. The other part played by him is that he had held the victim by the waist while Batka inflicted the second blow with the knife on the victim's chest. This witness has admitted that although he saw the two parties quarrelling and trading fisticuffs, he did not bother to intervene or pacify either Punjabi, the victim or Kalu. Similarly, when the incident occurred on the work site, this witness did not bother to separate the two.

10. Therefore, if at all the version of the prosecution is accepted, the only role which can be attributed to the accused is that he exchanged fist blows with the victim and that he held him at the waist when Batka inflicted the knife blow on his chest. In such circumstances, in our opinion, when the identity of the accused itself is in doubt, it is difficult to accept the case of the prosecution that the accused was responsible for the death of the victim. The accused is, therefore, entitled to be acquitted.

11. The impugned judgment and order is set aside. The

conviction and sentence imposed by the learned Sessions Judge, Bombay are set aside.

12. Appeal allowed. Accused be set at liberty forthwith, if not otherwise required.

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